

INTERIOR BOARD OF LAND APPEALS

Arizona State Association of 4-Wheel Drive Clubs, Inc.

165 IBLA 153 (March 29, 2005)

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ARIZONA STATE ASSOCIATION OF 4-WHEEL DRIVE CLUBS, INC.

IBLA 2003-30

Decided March 29, 2005

Appeal from a decision of the Field Manager, Tucson (Arizona) Field Office, Bureau of Land Management, approving in part an application for a special recreation permit. AZA-31448.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Land Use Planning--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Generally--Special Use Permits

BLM is required to designate all public lands as either open, limited, or closed to off-road vehicle (ORV) use, and approval of a resource management plan, revision, or amendment constitutes formal designation of ORV use areas. Operation of ORVs is permitted on areas and trails designated as open to ORV use, and in areas designated as "limited" in conformity with the terms and conditions of the orders designating them as limited, but is prohibited on areas and trails closed to ORV use. Although the regulations define "closed area" as "an area where off-road vehicle use is prohibited," they also provide that use of ORVs in closed areas may be allowed for certain reasons, but only with the approval of the authorized officer.

2. Federal Land Policy and Management Act of 1976: Land Use Planning--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Generally--Special Use Permits

A BLM determination concerning authorization of ORV use will be affirmed if the decision is supported by the record, absent compelling reasons for modification or reversal. When BLM found that increasing ORV use of a canyon, due to the mistaken perception that it was open

to general ORV use, had caused unacceptable impacts to riparian values and appellant has provided no evidence that is sufficient to overcome this conclusion, an decision rejecting a special recreation permit for use of the canyon will be affirmed.

APPEARANCES: Bradley Jones, President, Arizona State Association of 4-Wheel Drive Clubs, Inc., Tempe, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Arizona State Association of 4-Wheel Drive Clubs, Inc. (ASA4WD), has appealed from a September 16, 2002, decision of the Field Manager, Tucson (Arizona) Field Office, Bureau of Land Management (BLM), to the extent that BLM did not authorize use of a route called the “Jawbreaker” in approving ASA4WD’s application for a special recreation permit (SRP) for a jamboree to be held October 17-20, 2002. Although the Jawbreaker route had been included in SRP’s issued in 2000 and 2001, BLM asserts that the Jawbreaker route is not open to off-road vehicle (ORV) use under the Phoenix Resource Management Plan (RMP). BLM also states it is taking other actions to implement the RMP that “include posting no vehicle use, removing past traces of use, and future barricades to prevent vehicle use in the Canyon.” (Answer, 8.)^{1/}

^{1/} BLM has moved to dismiss this appeal, asserting that its action is discretionary and that appellant has not addressed with specificity the reasons for the decision. (Answer, 19-20.) The discretionary nature of a BLM decision does not make an appeal subject to dismissal. It is well established that when BLM uses its discretionary authority to reject an application for a land use authorization, it must provide a rational basis for its decision, and its decision will be reversed if it fails to do so. Fallini v. BLM, 162 IBLA 10, 33-34 (2004). In this case, BLM’s decision was based in part on its determination that the Jawbreaker was not an existing trail under the RMP, and appellant has specifically challenged this finding and offered evidence in support of its position. Having provided reasons why it believes BLM’s decision is in error, appellant has satisfied the requirement of filing a SOR, and BLM’s motion is properly denied. See Skip Meyers, 160 IBLA 101, 107 n.4 (2003).

Nor will we dismiss the appeal as moot. The jamboree has taken place and this appeal might be considered moot because we cannot provide any effective relief. However, the Board may decline to dismiss an appeal as moot if the issue(s) raised would evade review because the challenged actions are too short in duration to be

(continued...)

The authorized jamboree events took place on public land administered by BLM in the White Canyon Resource Conservation Area in the vicinity of Cottonwood Canyon and Martinez Canyon east of the town of Florence in Pinal County, Arizona. Appellant's proposal also involved land near Black Canyon City in Yavapai and Maricopa counties. The Jawbreaker route goes through a portion of lower Martinez Canyon in sections 24 and 25, T. 3 S., R. 11 E., Gila and Salt River Meridian. Appellant refers to the trail as "the hard way to the Coke ovens," and asserts "[i]t is part of an old (1880's) wagon trail." (Statement of Reasons (SOR) at 1.) Appellant argues that BLM's "closure denies lawful access to the Jawbreaker Trail by motorized recreation enthusiasts," which appellant believes is an existing trail under BLM's RMP. Id.

On September 16, 2003, BLM issued an environmental assessment (EA) addressing ASA4WD's permit application and analyzing the impact of proposed new trip routes and continued use of previously permitted routes. (EA# AZ-060-2002-0030.) The EA referred to the Jawbreaker route:

One of the trip routes permitted in 2000 and 2001 ('Jawbreaker') is along a historic road along Martinez Canyon. The historic road was abandoned. The present road to the north replaced it. It washed out and became overgrown with riparian vegetation. In 1999 trimming and clearing work was done on this route without BLM authorization to make it passable by vehicles. It is not considered to be an 'existing road or trail' under current OHV designations. However, the route was permitted in October 2000 subject to conditions that called for monitoring and made any future use contingent on results of the monitoring. (See EA# AZ-060-2000-0063). A determination was made in 2000 that use of this route is not in conformance with the RMP.

(EA, 2.) The EA considered the proposal, a no action alternative, and an alternative that would exclude the Jawbreaker. The latter alternative was "aimed at resting the riparian area from impacts related to vehicle use, restoring impacts from vehicle use during the past three years, and allowing natural processes to continue regenerating riparian vegetation." (EA, 4.)

^{1/} (...continued)

fully litigated prior to their cessation or expiration and there is a reasonable expectation that the same issue will be presented in similar circumstances in the future. Coalition for the High Rock/Black Rock Emigrant Trail National Conservation Area, 147 IBLA 92, 94-95 (1998). Those circumstances apply here, particularly in view of BLM's determination that the Jawbreaker is not an existing trail under the RMP. See Daniel T. Cooper, 150 IBLA 286, 290 (1999).

On September 16, 2002, the Field Manager adopted the alternative that excluded the Jawbreaker in a Decision Record that offered the following rationale:

Since this part of Martinez Canyon was opened to OHV use in the fall/winter of 1999, ongoing casual use has been attracted in part by having authorized its use by organized groups. Users have come to believe that this stretch of canyon is open to OHV use generally, and use is causing unacceptable impacts to riparian and wildlife habitat values. A proper functioning condition assessment completed in 2001 indicated the area was functioning at risk. The riparian vegetation along the canyon is recovering from impacts of past land use practices. Continued OHV use will interfere with the natural vegetation development process, preventing trees, shrubs and other plants from becoming established, and damaging existing vegetation cover. Action is needed to prevent further deterioration from unmanaged OHV use.

(Decision Record at 3.)

Appellant asserts that the route has been used for many years and is an existing trail under the Phoenix RMP. Appellant also refers to prior authorizations for use of the trail in 2000 and 2001. Appellant values the Jawbreaker because of the challenge it poses to ORV drivers. A paper promoting appellant's 2002 Jamboree describes the Jawbreaker as a trail not to be tried "unless you are an experienced 4-wheeler with a well equipped vehicle." Appellant assigns the Jawbreaker a "4.0+ Rating" on a 5-point scale. This rating indicates a need for "[g]reatest amount of ground clearance due to moderate - large sized rocks and obstacles" and "[j]acks and winches [are] advised." The case file contains a description of the arduousness of the Jawbreaker from an enthusiastic writer who describes a 10-hour journey leading to "one broken axle, and several instances of body damage, and several near roll overs." The final obstacle was a waterfall, where most participants "end[ed] getting winched or tugged off." ^{2/}

[1] Under 43 CFR 8342.1, BLM is required to designate all public lands as either open, limited, or closed to ORV use, and approval of an RMP, revision, or amendment constitutes formal designation of ORV use areas. 43 CFR 8342.2(b). Operation of ORVs is permitted on areas and trails designated as open to ORV use, and in areas designated as "limited" in conformity with the terms and conditions of

^{2/} Doug Ballard, "Arizona Virtual Jeep Club - Trips, Jaw Breaker - Saturday, November 25, 2000." See <http://www.avjtc.org/Trips/View.asp?T=44>.

the orders designating them as limited. 43 CFR 8341.1 (a), (b).^{3/} Operation of ORVs is prohibited on areas and trails closed to ORV use. 43 CFR 8341.1(c). Although the regulations define “closed area” as “an area where off-road vehicle use is prohibited,” they further provide: “Use of off-road vehicles in closed areas may be allowed for certain reasons; however, such use shall be made only with the approval of the authorized officer.” 43 CFR 8340.0-5(h).^{4/}

The 1989 Phoenix RMP provides as follows with respect to off-road designations: “Vehicular travel is limited to existing roads and trails on all the RMP area’s public land with the exception of those areas specifically identified as closed or limited to designated roads or trails.” (Answer, Ex. G., 3.) The Jawbreaker is not within a specifically identified area so ORV use is permitted there only if it is an existing road or trail.

BLM’s regulations for ORVs do not define the term “trail” in the context of vehicular use, but if we assume that the dictionary definition of “trail” (see 44 FR 38434, col. 2) includes terrain as described above for the Jawbreaker, the issue is whether the Jawbreaker was an existing trail in 1989 when the RMP was adopted. In support of its contention that the Jawbreaker is an existing trail, appellant has submitted four statements. The first is a statement from WJ Stone, who was 82 and has lived in Arizona for many years and claims to have been driving “one trail they were talking about for many years.” (SOR, Appendix A.) He describes the trail as having changed over the years and having a mining road along side it. He does not recall the present name but asserts that the trail “was the riverwash from the mouth of Martinez canyon that had a large mining operation running for many years to the

^{3/} Departmental regulation 43 CFR 8340.0-5 defines “open” and “limited” areas as follows:

“(f) *Open area* means an area where all types of vehicle use is permitted at all times, anywhere in the area subject to the operating regulations and vehicle standards set forth in subparts 8341 and 8342 of this title.

“(g) *Limited area* means an area restricted at certain times, in certain areas, and/or to certain vehicular use. These restrictions may be of any type, but can generally be accommodated within the following type of categories: Numbers of vehicles; types of vehicles; time or season of vehicle use; permitted or licensed use only; use on existing roads and trails; use on designated roads and trails; and other restrictions.”

^{4/} The definition of ORV expressly excludes “any vehicle whose use is expressly authorized by the authorized officer, or otherwise officially approved.” 43 CFR 8340.0-5(a)(3). This exclusion provides a mechanism for addressing concerns “that farmers, ranchers and miners could be prevented from conducting their businesses as a result of the closure provisions of these regulations.” 44 FR 34834 (Jun. 15, 1979).

road that goes to the coke ovens at a town called Cockran.” He states: “My buddies drove this area and hunted this area for many years.”

A letter filed identifying Bill and Amy Mihailov and Mike and Linda Pidanick refers to use of the “box canyon area” in the 1960’s, picnicking in the area of the corrals at the end of the Jawbreaker, and driving as far as they could within the limitation of their vehicles. (SOR, Appendix B.) They refer to use of the Jawbreaker in the 1970’s and 1980’s, but were unable to drive the entire route in the early years because the vehicles were not equipped for the rougher areas of the route.

A letter from John T. McCullen asserts use in the early 1970’s and asserts that after his family returned to Arizona in 1984, the trail has been traversed numerous times each year. (SOR, Appendix C.)

A fourth letter from Sandee McCullen, appellant’s Jamboree Chairman from 1996 to 2000, asserts that vegetation in the canyon has improved notwithstanding increased ORV use. (SOR, Appendix D.) She specifically refers to BLM’s concerns about tree-trimming and BLM’s reliance on it as evidence that the trail was not an existing route:

When I personally questioned the issue of “tree trimming” I was told evidence was found of “recent tree trimming, some 3-4 years old and some as old as 8 years old. This in itself would have shown use back as far as around 1992. Prior to this time most likely the trees were not large enough to need trimming.

McCullen states that the trees are trimmed to prevent damage to them, and also states she was told that BLM had no evidence that the trees were trimmed by ORV users. McCullen asserts that the trail has been used many years pre-dating the 1989 RMP.

BLM views these statements as insufficiently specific with respect to the exact area of use or the extent of use at the particular time the RMP was adopted. (Answer, 14-18.) BLM has researched the history of the route and found that a 1900 map shows a trail from the coke ovens up Martinez Canyon through the Jawbreaker route, and that cadastral survey notes refer to a trail near the area. (Answer, Ex. F, Declaration of Shela McFarlin, 5-6.) BLM also refers to a statement by a rancher who grew up at a ranch near the northern end of the Jawbreaker who indicated that the old trail washed out in the 1930’s from a major flood and another road was built for use instead of the trail. *Id.* With greater pertinence to the time when the RMP was issued, BLM refers to a 1992 Riparian Assessment containing photographs that show no evidence of vehicle tracks or motorized use of the area. (Answer, Ex. I.) BLM

asserts that the canyon was not opened to vehicle use until vegetation was cut without authorization in 1999.

BLM has received letters from a volunteer providing specific evidence that a road had been cut in the canyon in 1999, referring to cutting “at least 25 live mesquite trees” and some tree trunks “up to 5 inches in diameter.” Although Sandee McCullen’s letter states that there is no evidence that the trees were cut by ORV users, the fact that vegetation of that size was there to be cut impels us to conclude that the canyon is not an existing route under the RMP, a conclusion that is also supported by the lack of vehicle use evident in the 1992 riparian assessment. Appellant has not offered sufficiently probative countervailing evidence that would warrant reversal of BLM’s determination that the Jawbreaker was not an existing route under the 1989 RMP.

[2] Appellant’s application that included the Jawbreaker was filed pursuant to 43 CFR Subpart 8372 (2000).^{5/} 43 CFR 8372.3 provided that the approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer. Although the Jawbreaker trail is closed to ORV use under the Phoenix RMP and ORV use is prohibited under 43 CFR 8341.1(c), use of ORVs in closed areas may be allowed for certain reasons but “such use shall be made only with the approval of the authorized officer.” 43 CFR 8340.0-5(h). In cases in which we have reviewed BLM decisions relating to its authority to authorize ORV use through the permitting process, we have held that absent compelling reasons for modification or reversal, a BLM determination will be affirmed if the decision is supported by the record. Stan Rachesky, 124 IBLA 67, 70 (1992); American Motorcycle Association, District 37, 119 IBLA 196, 199 (1991). In this case, BLM found that increasing ORV use of the canyon due to the mistaken perception that it was open to general ORV use had caused unacceptable impacts to riparian values that justified denial of appellant’s application. Appellant has provided no evidence that is sufficient to overcome this conclusion.

^{5/} These regulations were superseded by new rules published at 43 CFR Part 2930, effective Oct. 31, 2002. See 67 FR 61740 (Oct. 1, 2002).

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge